Proposal Preparation Costs for Unsolicited Proposals

By Rachel M. Howard
AMCOM Legal Office

The question has recently arisen whether an unsolicited proposer may be entitled to proposal preparation costs. In our case, a contractor had approached the government with an idea for providing new support services. Conversations were had with the contractor over a period of literally years and it appeared at one point that the government was leaning towards passing on the idea. When the government communicated this position, the contractor began making noises about claiming proposal preparation costs. Given that by this time these costs had reached the tens of millions of dollars, these threats engendered some research on the topic. And given further the trickle-down nature of research assignments, this task eventually found its way to my desk. I thought to share the fruits of this effort might save someone some time in the future.

I. Do you have an unsolicited proposal?

As a general rule, proposal preparation costs are allowable when the government has solicited submission of the proposal, inducing the contractor to expend the cost of preparing it, and then behaved in an arbitrary and capricious manner in the evaluation of it or in the award of the contract (such as by failing to consider the proposal in a fair and honest manner). If a proposal is unsolicited, it appears that proposal preparation costs are probably not allowable. Thus the first question that you must answer, which may seem rudimentary, is whether you are dealing with a truly unsolicited proposal. This is not as simple as it seems, because the character of the proposal can actually change with the evolution of the situation. A proposal for an idea totally originated by a contractor can, by the end of the process, actually have metamorphosed into a "solicited" proposal, even though no solicitation (as we think of it) was ever issued. The place to begin examining this question, of course, is the FAR, which not unsurprisingly has something to say on the subject.

FAR 15.601 defines an unsolicited proposal as "a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals...or any other Government-initiated solicitation...." This definition seems to stand on its own and to be clear-cut in its distinction that submissions in response to formal government requests are solicited, and that all others are unsolicited. However, the FAR itself immediately muddies the situation by defining a number of types of submissions that are not to be considered unsolicited proposals, namely advertising

materials, commercial item offers, and suggestions made to the government with no accompanying indication that the source intends to devote further effort to the idea. FAR 15.603(b). But does this mean that by the converse, for example, if a contractor suggests an idea to the government which is not in response to any formal request for such a suggestion, while at the same time the contractor indicates that it intends to devote time and money to further develop the concept, the suggestion is a solicited proposal? Why are these definitions of what are not unsolicited proposals necessary if only submissions in response to formalized requests are to be considered solicited?

To further confuse the matter, FAR 15.602 states that it is the policy of the government to encourage the submission of new ideas in response to government-initiated solicitations or programs, but when an idea does not fall under a topic area publicized under those programs, the idea may be submitted as an unsolicited proposal. This seems to indicate that if an idea falls within the advertised purview of a government program, it may be considered solicited, even though no formal government solicitation was issued.

In a further effort to clarify what is solicited and what is unsolicited, the FAR goes on to say that unsolicited proposals "in response to general statements of agency needs" (whatever these may be) are considered to be "independently originated," which is a requirement for a "valid" unsolicited proposal. FAR 15.603(d). Does this mean that proposals submitted in response to specific statements of agency needs are to be considered solicited? This interpretation is borne out to some extent in the case law, where the courts have devoted varying amounts of time to analyzing the content of communications between the government and the contractor before submission of the proposal.

Thus, in the end, even if you have not issued a solicitation, it may still be that you have unwittingly solicited the proposal you have in hand. To decide whether the proposal is truly unsolicited, you should carefully examine any communications between the government and the proposer that took place before its submission. In our case, it remains unclear whether the wealth of communications with the proposer (which included providing input on the content of the proposal) rendered the proposal "solicited." If you decide that your proposal can safely be called "unsolicited," proceed to the next section.

II. Disclaimer of Liability

In the original memorandum upon which I based this article, I spent four pages analyzing the case law on this subject, two of it distinguishing a single aberrant case (the discussion of which is reproduced below). As I am sure you have noticed, decisions of the Comptroller General tend to be very fact-dependent and result-oriented, and are frequently decided without much of an eye for precedent. This makes deriving a general rule of law an arduous

process of harmonizing and distinguishing cases, with much energy spent on discussing the facts of individual cases. This process also leaves much room for reasonable lawyers to disagree about the conclusions thus drawn. Still, I will share with you my general conclusions about the law on this subject, with the caveat that there is some troubling authority to the contrary, and with the warning that you really should go read these cases yourself.

III. Discussion of Case Law

A. The General Rule

It is safe to say that, as a general rule, unsolicited proposers are not entitled to proposal preparation costs. In one Comptroller General decision, the court held that one who submits an unsolicited proposal becomes a "volunteer, and as such, is not entitled to compensation for his work in preparing the proposal." Matter of Charles G. Moody, 1978 U.S. Comp. Gen. LEXIS 2471, *6, B-191181, April 27, 1978. In Moody, Mr. Moody performed unsolicited work on a technical report after his retirement from the Navy, and then claimed payment for the work. Id. at *2-*6. The Comptroller General found that Mr. Moody's actions basically constituted the submission of an unsolicited proposal, and held that as a volunteer he was not entitled to compensation for his work. Id. at *6.

In making its decision in Moody, the Controller General cited Matter of International Explosive Services, Inc., 55 Comp. Gen. 164, 1975 U.S. Comp. Gen. LEXIS 90, B-183247, August 19, 1975. The International Explosive Services case involved a company that had anticipated contracting with the Egyptian Government to reconstruct the Suez Canal, but the work was undertaken by the U.S. government at its own expense, thus usurping the company's opportunity to contract with Egypt to perform the services. Id. at *1-*4. The court held that in submitting its unsolicited proposal to the Egyptian Government, International Explosive Services was acting as a pure volunteer. Id. at *4. The court found that there was no element present in the case that would remove the company from the category of volunteer, as in cases where compensation had been granted. Id.

By referring to circumstances that might remove an unsolicited proposer from the category of volunteer, International Explosive Services implies that under appropriate circumstances, a submitter of an unsolicited proposal might be entitled to compensation for preparation efforts. The only case cited by International Explosive Services for this proposition is J.C. Pitman & Sons, Inc. v. United States, 317 F.2d 366 (Ct. Cl. 1963). J.C. Pitman is a tax case in which a company paid the tax liability of another company because it was under a mistaken impression that it was required to do so by the IRS. J.C. Pitman & Sons, Inc., 317 F.2d at 366-703. There is actually no meaningful discussion in that case that sheds light on the distinction between a volunteer

and a non-volunteer, merely the implication that one is not a volunteer if under some compulsion or obligation imposed by the government to act. See id. at 368. Although this kind of duress would seem to be rare, you should evaluate your case to ensure that there was no obligation imposed by the government analogous to the one present in J.C. Pitman.

B. The Aberration

I located only one case wherein a court appeared to believe that proposal preparation costs might be recoverable by an unsolicited proposer. In Matter of Bell & Howell Company, Bell & Howell had been subcontractor on an Autonetics contract with the Navy. Matter of Bell & Howell Co., 54 Comp. Gen. 937, 1975 U.S. Comp. Gen. LEXIS 157, B-180199, May 1, 1975. The Navy did not believe that the Bell & Howell equipment met the specifications of the prime contract, and stated its intent to issue a change order requiring Autonetics to use Honeywell equipment instead. Id. at *1-*2. The Navy gave Bell & Howell the opportunity to perform tests to prove the equality of the Bell & Howell equipment with the Honeywell equipment. Id. at *2. If the data demonstrated compliance, then Bell & Howell would be permitted to compete for a subsequent procurement. Id.

The tests were completed, and a Navy official told Bell & Howell that the results were acceptable. Bell & Howell, 1975 U.S. Comp. Gen. LEXIS 157, at *3. On this basis, Bell & Howell submitted an unsolicited proposal four days before the issuance of the change order, although the Navy then refused to consider it. Id. Bell & Howell filed a claim for proposal preparation costs, arguing that the Navy had encouraged its participation and then refused to consider its proposal. Id. at *5. The Navy defended that the test results did not meet the specifications, and further, that the Navy official did not possess actual authority to accept the results. Id. at *4.

The court accepted Bell & Howell's view of the issue presented: that the government encouraged Bell & Howell to submit a proposal, and then refused to give it fair consideration. Bell & Howell, 1975 U.S. Comp. Gen. LEXIS 157, at *5. The court discussed the rule of law previously applied only to solicited proposals, stating that aggrieved bidders may recover bid preparation costs when the government fails to fairly and honestly consider a bidder's proposal. Id. at *6. The court did note that all of the reviewed cases involved direct and open encouragement or inducement by the government to potential bidders to submit bids, impliedly distinguishing those cases and the one before it from cases in which unsolicited proposals were submitted without any encouragement from the government. Id. at *6.

The court went on to hold that because the unsolicited proposal was contingent on acceptance of the equipment, the submission of the unsolicited proposal did not give rise to any obligation on the part of the government to fairly and

honestly consider the proposal, even though the government encouraged the proposer's effort. Id. at *10-*11. Thus, even if the contractor establishes that the government in some way encouraged its efforts in making the proposal, still no obligation arises on the government's part to afford the proposal any particular level of consideration.

The result in Bell & Howell is consistent with the general rule in that the court denied proposal preparation costs to an unsolicited proposer. However, it is worrisome that the court based its holding not on the rule that preparation costs are not recoverable for unsolicited proposals, but rather on the fact that consideration of the proposal was contingent on the Navy's acceptance of the equipment. Bell & Howell, 1975 U.S. Comp. Gen. LEXIS 157, at *10-*11.

In fact, the court commented that the "various costs directly related to the preparation and submission of the unsolicited proposal...might very well be compensable as proposal preparation costs." Bell & Howell, 1975 U.S. Comp. Gen. LEXIS 157, at *9. When taken out of context, this statement appears to be inconsistent with the general rule that such costs are not compensable. However, the statement does not appear as a part of the court's holding, but rather in a discussion of what costs are includable in bid preparation costs. The court distinguished between the costs incurred by the company in its effort to expand or broaden the needs of the government (which it felt were noncompensable) versus the costs directly related to the preparation and submission of a proposal (which might be compensable). Id. at *6-*10.

Perhaps the plainest reading of Bell & Howell is that the court simply treated the case before it like a solicited proposal due to the government's encouragement of its submission. Implicit in its rationale is the concept that a proposal may be "solicited" even without a formal solicitation; that "encouragement" is sufficient solicitation to invoke the law applicable to solicited proposals. This serves to reemphasize the importance of evaluating your client's involvement in the submission of the proposal you have at issue.

If Bell & Howell is raised by your opponent or the court, your first argument should be that the portion of the Bell & Howell decision regarding what costs would be allowed in a proper case is dicta, because the court found that the government owed no duty to Bell & Howell, and hence it was unnecessary to the decision. If forced to apply that portion of Bell & Howell to your case, you may argue that none of the costs incurred by the contractor would be compensable because they resulted from an effort to convince the government to expand or broaden its needs. In the worst case, the contractor's recovery would be limited to its direct costs in preparing the proposal for submission.

Further, you may be able to distinguish Bell & Howell on the facts. In Bell & Howell, the government directly encouraged the company to prepare a proposal for

consideration, even though there was no formal solicitation. In your case, did the government approach the contractor with the concept or ask the contractor to prepare a proposal for consideration? This of course is back to the original issue of whether the proposal is solicited or unsolicited, which is a question of fact.

Finally, Bell & Howell was decided in 1975, three years before the Moody case. If necessary, you can argue that Moody impliedly overruled any holding in Bell & Howell to the extent that it conflicts with the Moody decision.

III. Conclusion

Your first defense to a claim for proposal preparation costs should be that these costs are not recoverable for unsolicited proposals, under Moody and International Explosive Services.

If Bell & Howell is raised, you should argue that it does not apply to your case because it is has been impliedly overruled, and if not, because it is distinguishable on the facts. Alternatively, if you can discern anything in your facts that could be interpreted as a contingency, you can rely on Bell & Howell for the defense that acceptance of the unsolicited proposal was contingent on some condition which failed, and thus the government was under no duty to consider the proposal. Even if it were found that there was no contingency, and thus a duty did arise, you should argue that the government did not breach the duty to fairly and honestly consider the proposal. Ultimately, even if there were a duty and a breach of duty, the contractor is not entitled to recover its costs if they were incurred in an effort to expand or broaden the government's needs.

There is no simple answer to the question posed at the beginning of this article. If this situation ever finds its way to your desk, how the government proceeds in defending or settling the claim will be based on the cost-benefit analysis required in making such decisions, given as always imperfect facts and imperfectly-clear law.

POC is Rachel Howard at DSN 897-1294.